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October 18, 2016

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte*** **Filing of the American Cable Association:** ***Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*****, WC Docket No. 16-106;** ***Business Data Services in an Internet Protocol Environment*****, WC Docket No. 16-143;** ***Special Access Rates for Price Cap Local Exchange Carriers*****, WC Docket No. 05-25,** ***AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*****, RM-10593**

Dear Ms. Dortch:

On October 14, 2016, Ross Lieberman, American Cable Association ("ACA"), and Thomas Cohen, Kelley Drye & Warren LLP, Counsel to ACA, had meetings with Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel, Nicolas Degani, Legal Advisor, Wireline, and Kirk Arner, Intern, to Commissioner Pai, and Claude Aiken, Legal Advisor, Wireline, to Commissioner Clyburn. On October 17, 2016, Mr. Lieberman and Mr. Cohen met with Amy Bender, Legal Advisor, Wireline, to Commissoner O'Reilly. The purpose of these meetings was to discuss ACA's views in the above-referenced dockets.[1]

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[1] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Notice of Proposed Rulemaking, FCC 16-39 (rel. Apr. 1, 2016) ("Privacy NPRM"). *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Tariff Investigation and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) ("BDS FNPRM").

ACA represents approximately 750 smaller providers (Internet Service Providers ("ISPs")) of broadband Internet access service. Until the Commission's adoption of the

Privacy NPRM and Chairman Wheeler's Proposed Order

ACA representatives began the meetings by noting that based on the Chairman's Fact Sheet[2] and its discussions with Commission staff, the Chairman's proposed order mandating new privacy and data security requirements on ISPs seems to be more reasonable and balanced than originally proposed in the Privacy NPRM. The proposed order also seems to account in many instances for the needs of smaller ISPs to have greater flexibility and a longer timeframe to comply. Such relief for smaller ISPs is warranted since these ISPs have limited financial and human resources and the new rules will impose substantial compliance burdens on them. For instance, to comply with the new requirements, ISPs' personnel will need to devote time to understanding them, which may include consultation with outside counsel, conduct additional risk assessments, upgrade various operating systems, revisit relationships with unaffiliated vendors, secure data, maintain new records, train personnel, and upgrade consumer notices. Of course, ACA has yet to read the proposed order and, with its members, analyze the effect of both the disclosed and undisclosed new requirements and determine which of these are truly problematic. In addition, even with improvements in the proposed rules, ACA shares concerns expressed by many ISPs about continued shortcomings in the proposed rules for ISPs in general, and it has particular concerns about the impact of the proposal on smaller ISPs. To that end, ACA representatives suggested the Commission include the following changes or clarifications in the order:

2015 Open Internet Order, ACA members were subject to the Federal Trade Commission's ("FTC") oversight of their privacy and security practices subject to the FTC's Section 5 authority and an "unfair and deceptive acts or practices" standard. Overall, in the many years that ACA members have had to meet the FTC's requirements, the Customer Proprietary Network Information rules of Section 222 of the Communications Act, and the Cable Privacy requirements of Section 631 of the Communications Act, they have developed an excellent track record of compliance.

Hundreds of ACA members also provide business data service ("BDS") who have invested substantial amounts over the past decade and continue to invest to provide BDS or BDS-like services to commercial customers. In virtually all instances, they provide BDS using newly deployed fiber facilities and packet-based electronics – and many of them provide these services in smaller communities and rural areas. In all instances, they compete with the incumbent price cap local exchange carrier and often compete with numerous other non-incumbent providers.

[2] "Fact Sheet: Chairman Wheeler's Proposal to Give Broadband Consumers Increased Choice Over Their Personal Information," FCC Headlines (Oct. 6, 2016) ("Privacy Fact Sheet").

- **Increase the time required for smaller ISPs to comply with new data security requirements so that they have at least 90 days more time than larger ISPs and no less than 180 days in total.** ACA understands from discussions with Commission staff that the proposed rules will require ISPs to meet new data security requirements, which are informed by new "exemplary best practices," within 90 days of the effective date. This timeframe is too aggressive for smaller ISPs because they will most often need to work with outside counsel and consultants to understand the requirements and determine how they should be implemented. Moreover, vendors used by hundreds of smaller ISPs will most likely be dealing with larger ISPs first and hence will not be available to work with smaller ISPs. Accordingly, ACA suggests that smaller ISPs should be given at least 90 days more time to comply with the data security requirements than given to larger ISPs and in total no less than 180 days. Providing this additional time for smaller ISPs to come into compliance should not harm their customers, since there is every indication smaller ISPs are acting reasonably to protect the data security of their customers.

- **Recognize the limited financial resources of smaller ISPs in determining whether their data security practices are "reasonable."** The Chairman's Fact Sheet discusses factors to be accounted for in determining the "reasonableness" of an ISP's data security practices, including the size of the provider and technical feasibility.[3] However, it is not clear that accounting for size indicates the Commission will deem a smaller ISP's practices "reasonable" even though that the provider does not implement a certain practice because its cost per customer is significantly greater than for a larger ISP. As ACA representatives noted in their recent meeting with Bureau staff, "smaller providers have few resources and limited staff and expertise,"[4] and so these providers should not be expected to implement all the same practices as large ISPs, especially when the associated burdens are disproportionately significant. ACA representatives also noted that treating providers in this manner is consistent with the NIST Cybersecurity Framework. Accordingly, to the extent the text of the order does not already, it should explicitly state that a higher relative cost for a smaller ISP to implement a practice on a per customer basis compared to a larger ISP is a factor in determining whether an ISP's implementation of a practices is reasonable.

- **Permit smaller ISPs to rely on implied consent from customers when marketing services ancillary to or otherwise related to broadband services or other**

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3 Privacy Fact Sheet at 3.

4 *See* Letter from Thomas Cohen, Counsel to American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-106, at 3 (Oct. 4, 2016).

communications services. The Chairman's Fact Sheet indicates that ISPs may rely on a customer's implied consent to market other broadband services, including modems used for those services.[5] However, an ISP would be required to give a customer the opportunity to opt-out prior to marketing services ancillary to or otherwise related to broadband services or other communications services.[6] This distinction, however, does not reflect how smaller ISPs and their customers deal or expect to deal with each other. As a result, the proposed approval process would impose an artificial barrier on how these smaller ISPs do business – and, importantly, how their customers expect them to do business. For instance, if an ISP's service technician is at a home responding to a customer's complaint about slow broadband speeds, the technician could be delayed or restricted in providing information to the customer that the customer receives today and would want and expect to receive in the future. As just one example, if the customer's problem is due to his/her subscription to a low speed service tier and the customer is receiving both broadband and MVPD services from the provider at a reduced bundled price, the Commission's proposed rules would require the technician to determine whether the customer had opted-out before providing pricing information for a higher speed tier that is bundled with MVPD services. If the customer had opted-out, then such pricing information could not be provided at all.[7] If instead the customer's problem was due to a faulty wireless router, the technician would likewise need to check whether the customer had opted-out before making the customer aware of the pricing of wireless routers that the ISP offers for sale or lease. If the customer had opted-out, then the technician could not market the wireless router that the ISP makes available that could resolve the customer's problem immediately. These issues do not only arise when a customer contacts his/her ISP about a service problem, they also arise when an ISP uses standard network diagnostics in the normal course of business to examine network congestion and determines that an individual customer's usage pattern indicates a problem that the ISP might solve for that customer in a variety of ways – some directly related to the broadband service and some more ancillary. In essence, the Commission is drawing a distinction between ISP marketing of broadband services and other services and products that, when used to differentiate between implied and opt-out consent, does not align with customer expectations or serve customer interests. Accordingly, ACA urges the Commission to permit smaller ISPs to continue to rely on implied consent not

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5 Privacy Fact Sheet at 2.

6 *Id.*

7 The rules seem to suggest that in this instance the technician could only market the ISP's higher broadband speed tiers that are offered on a standalone basis even if the customer would want and expect to receive information about the reduced bundled pricing for a higher broadband speed tier that includes his/her existing pay-TV services.

only to offer other broadband services but to offer services and products related to that service or other communications services, including bundles of other products that would cost customers less.[8]

- **Do not treat web browsing and application usage history as sensitive personal information.** ACA agrees with other ISPs that the Commission should not include in the definition of "sensitive" personal information web browser and application use history.[9] Since this same definition and subsequent opt-in requirement would not apply to edge providers, it would not only disadvantage ISPs but confuse customers about how their information is being used. It also is inconsistent with the FTC's framework, even though the Chairman indicates in the Fact Sheet his proposals follow this paradigm.[10]

BDS NPRM and Chairman Wheeler's Proposed Order

ACA representatives next addressed the business data services ("BDS") NPRM. Based on their understanding of the Chairman's Fact Sheet,[11] ACA is heartened that the proposed order continues to apply a light touch regulatory regime to non-incumbent providers of BDS. Many hundreds of ACA members have invested substantial amounts of their own capital in network facilities and have taken significant risk to provide BDS or business data-like services. By continuing a light touch regulatory regime, the Commission will drive additional investment to the great benefit of commercial customers, wireless providers, and institutions. That said, from what ACA understands of the proposed order, it erects a real barrier to additional investment by limiting the provision of private carriage for business data-like services.

ACA representatives explained that proposed order seems to assume that all providers of business data-like services are in fact offering BDS, a telecommunications service subject to Title II of the Communications Act, i.e. common carriage. However, based on evidence already

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8 Even assuming that only a few customers have opted-out, the ISP and all of its customers, including those that did not opt-out, would be inconvenienced with the Commission's proposed rule due to the fact that an ISP service representative would be obligated to check whether the customer they are helping is one of the few that have opted-out before talking with them about options for resolving their problem.

9 *See, e.g.*, Letter from Rebecca Murphy Thompson, EVP & General Counsel, Competitive Carriers Association, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-106, at 4-5 (Oct. 13, 2016).

10 Privacy Fact Sheet at 1.

11 "Chairman Wheeler's Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market," FCC Headlines (Oct. 7, 2016) ("BDS Fact Sheet").

in the record, many providers of business data-like services do not hold themselves out as offering such service to any customer.[12] These operators are offering services to commercial customers only on a "one-off" or custom basis, often in response to requests from existing customers. For instance, many ACA members only provide business data-like services in response to Requests for Proposals ("RFP"). These responses are tailored to that individual RFP and are not based on a general offering with standard prices. Other ACA members respond and offer to provide business data-like service only when they receive an inquiry from an existing commercial customer using the provider's best efforts broadband Internet access or video service. Again, these providers tailor the service to individual customers and are not holding themselves out generally to provide this service.

ACA representatives continued by explaining that by assuming that providers of business-data like service are holding themselves out generally to offer BDS, the Commission would be inhibiting entry. Title II includes many regulatory requirements – which impose concomitant costs on providers – that smaller providers believe are significantly onerous that will result in them, for instance, not responding to a wireless provider's RFP for the provision of high performance Ethernet service to a limited number of cell sites. In addition, inhibiting a smaller provider's ability to initially offer business data-like service on a private carriage basis would prevent some operators from learning the business and investing in additional network facilities, both of which could slow its potential migration to holding itself to offer BDS to all commercial customers (as a common carrier). Moreover, there is no evidence in the record that imposing common carriage obligations on all non-incumbents is beneficial or otherwise warranted – or, for that matter, that limiting private carriage to the provision of business data-like services to research or educational networks only is sound policy or legally supported. In sum, the proposed order's mandate that non-incumbents providing business data-like services are in virtually all instances common carriers offering BDS is bad policy. It also is legally flawed. ACA representatives urged that the Commission back-off from this sweeping and unjustified approach and continue to address this matter on a case-by-case basis, examining the facts of each provider's offering.[13]

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12 *See, e.g.*, Reply Comments of the American Cable Association, WC Docket No. 16-143 *et al*., at 14-16 (Aug. 9, 2016).

13 Just as the BDS Fact Sheet notes that the Commission would be reluctant to sustain a complaint against a BDS provider that is a new entrant or has a smaller market share, so too should the Commission be reluctant to challenge the claim of a new entrant or provider with a smaller market share that it is offering business data-like services as a private carrier. Moreover as ACA discusses below (n. 14, *infra*), the Commission should employ this approach for smaller providers as whole.

ACA representatives finally noted that some parties might be seeking to have the Commission adopt an even more onerous complaint process for BDS providers offering packet-based services. First, adopting a more onerous complaint process would be inconsistent with the decision to continue a light touch regulatory approach for non-incumbents, which is based on an extensive record showing these providers do not price at supracompetitive levels or otherwise engage in practices that are unjust and unreasonable. Second, it would disproportionately burden smaller providers of BDS service who have limited financial resources and personnel to deal with complaints.[14] The Commission's current complaint process appropriately places a significant burden on the complainant to file a serious and complete case so that accused parties do not have to deal with unjustified or frivolous claims. The Commission has no basis to alter that practice in the case of complaints against non-incumbents.

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[14] While ACA appreciates that the Fact Sheet provides that "rates of new entrants and parties with smaller market shares are unlikely to be questioned," this approach does not necessarily alleviate the burdens faced by smaller providers in a complaint process. First, smaller providers may not be new entrants or may operate in smaller markets, where obtaining a customer or two may give it a significant share. Second, even if smaller providers meet one of these criteria and the Commission ultimately rules in their favor against complainants, smaller providers would still have had to retain counsel and participate in the complaint process to secure the Commission's favorable ruling. These costs can be significant for small providers, and complainants that understand these realities can leverage the threat or the actual filing of an expensive complaint process against smaller providers to secure below market rates. The Commission, therefore, should not only state that the rates of new entrants and parties with smaller market shares are unlikely to be questioned, but it should adopt better mechanisms, to protect them from threats of complaints and the filing of frivolous complaints or even non-frivolous ones. These mechanisms might include a higher initial threshold for complainants to bring a *prima facie* case against smaller providers or an obligation that the complainant submit a complete case with supporting evidence demonstrating clearly that a small provider's rates are supracompetitive.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,

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